No. 76-818

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

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R. D. FITCH, ET AL.,
Appellants,

VS.

HIJINIO SILVA, ET AL.,
Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

APPELLANTS' BRIEF OPPOSING APPELLEES' MOTIONS TO AFFIRM

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Now come Appellants and, pursuant to Rule 16(4) of this Court, and file this their brief opposing the "Motions to Affirm" heretofore filed by the Appellees (two motions).

NOMINAL PARTIES?

These motions are predicated on several fallacious considerations. Unable to deny the stark fact that several of the defendants in this case neither agreed to the "consent judgment," nor were given an opportunity to make a choice in the matter, Appellees seek to sweep this very basic violation of consitutional due

process aside by claiming that these parties were "nominal" parties.

This contention that the Sheriff (Sanders), County Chairman (Barnhart), and County Clerk (Hoyle) were nominal parties is not supported by the record. They were neither named nor described as nominal parties in the plaintiffs' pleadings, or in the temporary injunction order, or in the consent judgment in question. Indeed, in said judgment (the principal judgment in this case) they are each made fully responsible, by necessary implication, for complete compliance therewith.

Contrary to a statement contained on page (4) of the motion of Appellees Gonzales and Perez, not all of the defendants took "an open and active role" in settlement negotiations. Sheriff Sanders for one did not. Neither did Chairman Barnhart.

Further, to negotiate is not to agree and none of the non-commissioner defendants ever agreed to the so-called consent judgment. Indeed, the attorney claiming to represent them has admitted that he did not submit the judgment to them and request their assent or dissent. See transcript of the September 2 hearing, page 15, line 25, continuing on page 16, lines 1 through 7; page 21, lines 14 through line 25 and continuing on page 22, lines 1 through line 17; page 23, lines 17 through line 25.

Mr. Smith has denied Mr. Austin's hearsay assertion that he (Smith) submitted the agreed judgment to each defendant. Mr. Austin admitted that he signed and entered the judgment without personally securing the assent of the individual defendants he was pre-

tending to represent. Transcript, page 23, lines 17 through 22 inclusive. An affidavit was made by County Attorney Smith on July 10, 1976, (and filed with the Clerk shortly after (which refutes the hearsay claim by Austin. Smith stated, in part in said affidavit, that "The remaining defendants [all of them except Fitch, Boyd, and Perez — the latter now a plaintiff], again it must be re-emphasized, did not agree to the Order of June 28, 1976."

Again, the defendants Stacy, Lester, Barnhart, Hoyle, and Sanders have all testified, either in person or by affidavit, that the agreed or consent judgment was not agreed to or consented to by them.

There is no competent evidence to the contrary in the record whatsoever — not a scintilla!

The findings of the three-judge and single judge courts to the effect that "The agreed settlement . . . was entered into by the Defendants voluntarily and not as the result of fraud and compulsion" simply has no basis in the evidence whatsoever as far as the defendants Stacy, Lester, Sanders, Hoyle and Barnhart are concerned. These five defendants have never consented to this judgment at any time — either in spirit or in truth. Appellees would be hard pressed indeed to designate County Commissioners Stacy and Lester as "nominal" parties.

The Appellees want it both ways: As plaintiffs they wanted to subject all of the office holders to the full weight and peril of the judgment; as Appellees they want to pretend that the individual defendants were "nominal" parties whose consent to a judgment subjecting them to the penalties of contempt was not con-

stitutionally necessary.

This is, we respectfully submit, a hateful perversion of constitutional due process. The very fact that the Appellees all make big issue about the individual defendants being nominal parties gives the game away. This is a tell-tale admission that in fact they did not consent to the agreed judgment.

Appellees also try to beg this question by raising the false issue that "only the Commissioners' Court can defend and settle a lawsuit" against the County. True, but the County was only one of ten party defendants in this case. The individual defendants were also named in the consent judgment and the Commissioners' Court had no right to bind any individual to any judgment, as an individual, as a matter of law.

Not only are the questions before this court substantial but this question as to the right of an individual not to have a judgment entered against him without his consent is as fundamental a question of constitutional law as can be imagined in the realm of civil law.

The cause of civil rights is not served by ruthlessly oppressing the alleged oppressors. The judgment and instinct of the three judge court was right the first time in vacating the so-called consent judgment. Its reinstatement was improvident and not supported by the facts.

TRIAL ON THE MERITS?

Appellees incorrectly insist that Appellants were accorded a trial on the merits at the three judge court hearing held in Austin, Texas, on September 2, 1976.

The September hearing concerned only reinstatement of the so-called agreed judgment of June 28 and the transformation of the temporary injunction of April 28 into a permanent injunction. There was no trial on the merits whatever as to the substance of the agreed judgment or as to any other plan of apportionment.

Appellees correctly observe that the three judge court did not have jurisdiction to make a "Section 5 substantive judicial determination" (Motion of Silva, et al., page 5). Such determination should be made in the District of Columbia under the Voting Rights Act. What Appelles overlook, however, is that the plan of apportionment contained in the agreed judgement is a "substantive judicial determination" and is not "confined to a limited inquiry."

That jurisdiction cannot be conferred on a court by the consent or agreement of the parties — if it is otherwise lacking — is fundamental and well settled. 21 C.J.S. 127, "Courts", Sec. 85, "Jurisdiction by Consent." Scores of cases from virtually every jurisdiction in the United States are cited.

We cite here but one of these cases: **Neirbo Company, et al., v. Bethlehem Shipbuilding Corporation, Ltd.**, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167, 128 A.L.R. 1437.

Mr. Justice Frankfurter tersely states the familiar rule at the beginning of the second paragraph of the court's opinion: "The jurisdiction of the federal courts — their power to adjudicate — is a grant of authority to them by Congress and thus beyond the scope of litigants to confer."

The situation here then is clear. The three judge court did not have the power to adjudicate by a consent decree or agreed judgment what it did not have power to adjudicate in a contested adversary proceeding. On the other hand, if this was simply a choice of venue on which the parties could agree, the three judge court did have jurisidiction to accord Appellants a substantive trial on the merits. In either situation the hearing of September 2 was fatally defective.

Let us not, however, be diverted by this jurisdictional controversy from the real issue here which is one of basic due process. Whether the three judge court had the jurisdiction to enter the "agreed" judgment or not is beside the point when it is considered that as to some (if not all) of the party defendants the judgment binding them was entered without their consent, without their default, and without a trial on the merits anywhere. This is the issue. If a few parties can bind other parties to a judgement without their consent and without a trial, or if an attorney can do so in their behalf but without their authorization, the constitutional provision for due process becomes a mocking thing.

ABUSE OF DESCRETION

At the outset, under this subdivision of the brief, we point out that the findings of both the three judge and single judge court pertaining to the agreed judgment are couched in the most general language conceivable.

The three judge court merely said "2. The Agreed Settlement of May 13, 1976, (1976 Plan) (entered by

the Court nunc pro tunc June 28, 1976) changing the precinct voting boundaries in Frio County, Texas, was entered into by the Defendants voluntarily and not as the result of fraud or compulsion." Jurisdictional Statement, Appendix C, page 8. The single judge finding is exactly the same. Jurisdictional Statement, Appendix B, pages 14-15.

We think it is significant that these orders are not supported by any opinion or memorandum by these courts and that the "findings of fact" in the regard stated are so vague and general and do not take into account the uncontradicted testimony to the effect that at least five of the individual defendants did not agree to the judgment in simple fact.

There was never any allegation or issue of "compulsion." There was never any claim of "fraud," either eo nomine or in technical effect, as fraud is properly defined. Misrepresentation as to the law and the facts by the Special Attorney — Yes. Such misrepresentations were compatible with good faith and good intentions (and the contrary was never alleged) but they were nevertheless incorrect and professionally deficient. The counsel has admitted that he was in error on the **Beer** case (sadly in error we might say). See transcript, pages 25-26. It was certainly an important case as to these defendants and the advice they were given with respect thereto was totally wrong.

Appellees want this court to believe that these individual defendants were merely nominal parties but also want it to believe that the Special Attorney was not necessarily misleading them about their supposed inability to re-apportion until 1981 under any circum-

stances unless they swallowed this settlement because they could have been held in contempt if they reapportioned prior to 1981. Parties who are in danger of being held in contempt under a judgement cannot be said to be nominal parties. Also, a reapportionment in the teeth of the settlement plan would have been as contemptible as any future reapportionment.

The plain fact is that on the basis of valid new data, and with a Justice Department clearance or a District of Columbia declaratory judgment, defendants can reapportion at any time.

The cry of Appellees (in which they echo the single judge court) is that defendants merely changed their minds.

The fact is that the County Judge and one of the Commissioners (Boyd) had voted for the settlement against their will but upon good faith belief in bad advice (which itself may have been given in personal good faith but without due professional care).

However, as to Stacy, Lester, Sanders, Hoyle and Barnhart, there was no occasion for (or possibility of) a change of mind. None of these defendants ever agreed to the so-called "settlement." This is the key fact in this case.

In the light of this fact we see no reason to prolong this discussion.

Appellees have conceded the jurisdiction of this court. Appellants have demonstrated (unless we are grossly misrepresenting the record) that a particularly flagrant violation of due process has occurred. This

case should be given plenary consideration as a matter of constitutional principle.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on this the 4 day of February, 1977, copies og Appellants' Brief Opposing Appellees' Motions to Affirm were sent to the following attorneys of record for Appellees:

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by depositin gsame in the United States Post Office with proper postage affixed thereto.

All parties required to be served have been served.
Dated: February 4, 1977.

HARVEY L. HARDY